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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case No: 3672/2023

Date Heard: 1 August and 10 September 2024

Date Delivered: 10 October 2024

In the matter between:

E[...] M[...] T[...]

APPLICANT

and

N[...] T[...]

RESPONDENT

JUDGMENT

MULLINS AJ:

INTRODUCTION

[1] The parties are involved in the throes of a defended divorce action which shows no signs of being resolved any time soon. The disputes referred hereunder emanate from that action.

[2] To avoid confusion I will refer throughout to the Plaintiff in the action (Mrs T[...]) as the Applicant and the Defendant (Mr T[...]) as the Respondent.

[3] The Applicant was represented by Ms *Crouse* SC and the Respondent by Mr *Joubert*. I am indebted to counsel for their assistance.

[4] The parties were married to each other on 2 March 1996 out of community of property with the inclusion of the accrual system. Two sons, both of whom are majors, but who are to a large extent still dependent, were born of the marriage. Fortunately, they play no part in these proceedings.

[5] Subsequent to the institution of the divorce action, on 26 October 2023 the Applicant launched a Rule 43 application, which the Respondent opposed. After hearing argument Eksteen J made the following order (the “Rule 43 Order”):

- “1. The Respondent pay maintenance *Pendente Lite* to the Applicant in the amount of R15 000.00 per month, the First Payment to be made within five (5) days of this order and thereafter on or before the 1st day of each subsequent month, without set-off or deduction of any costs of whatsoever nature.
2. The Respondent retain the Applicant on the current medical aid scheme or a scheme with similar benefits, and is to pay all premiums thereof, as well as reasonable medical costs not covered by the said medical aid scheme.
3. The Respondent ensure that the Toyota Fortuner motor vehicle currently in possession of the Applicant is serviced annually, the First service to be carried out within 10 days of this order, and to pay for such service.
4. The Respondent continue to make payment towards the erstwhile joint household which he had been paying at the time of vacating the erstwhile matrimonial home, inclusive of, but not limited to, electricity, DSTV, WI-FI, alarm system and insurance.
5. The Respondent make a contribution to the Applicant’s legal costs in the amount of R90,000.00 which is to be paid in three equal instalments, the first instalment to be paid by 31 December 2023, and the subsequent instalments by 31 January 2024 and 29 February 2024, respectively.

6. The costs of the application will be costs in the action.”

[6] What is before me are the following:

- (a) An application to have the Respondent found guilty of contempt of court for failing to comply with the Rule 43 Order, which is opposed by the Respondent (the “Contempt Application”);
- (b) An application by the Respondent in terms of Rule 43(6) for a variation of the Rule 43 Order, which is opposed by the Applicant (the “Variation Application”).

[7] As the two matters are essentially two sides of the same coin it was directed that they be heard together. In addition, the original Rule 43 is relevant because it has a direct bearing on whether the Respondent has made out a case for a variation.

[8] The Contempt Application was launched on 12 January 2024 and the Variation Application, which is essentially a counter-application, on 4 June 2024. The reason for the substantial period of time between the two applications is explained by the allegation by the Respondent that he only discovered the Applicant’s changed circumstances at a much later date.

[9] I do not intend to traverse the allegations and counter-allegations contained in the voluminous papers before me.¹ Suffice it to state that after hearing argument I was satisfied that the Respondent was in contempt of the Rule 43 Order, but that insofar as the Variation Application was concerned certain further information was necessary. In the circumstances I handed down an order which reads as follows (the “Interim Order”):

“A CONTEMPT OF COURT APPLICATION

¹ The Rule 43 application is 90 pages in length; the Contempt Application is 106 pages long; the Variation Application is 128 pages. Total 324 pages.

1. The respondent, Mr T[...], is hereby held to be in contempt of court due to his wilful and mala fide failure to comply with the order of this honourable court, dated 5 December 2023 (the court order).
2. The respondent is sentenced to undergo 30 days imprisonment, which sentence is suspended for 18 months on condition that, within 20 days of this order, he:
 - 2.1. Pays all arrear maintenance, and continues to pay the maintenance as provided for in paragraph 1 of the court order;
 - 2.2. Pays all the arrear reasonable medical costs not covered by his medical aid scheme, and continues to pay these costs, as provided for in paragraph 2 of the court order;
 - 2.3. Attends to the annual service of the Toyota Fortuner motor vehicle, as provided for in paragraph 3 of the court order.
3. In the event of the respondent failing to comply in paragraph 2 above and/or failing to comply with the court order in the future, the applicant may approach the court on the same papers, suitably amplified, for the implementation of the suspended sentence.
4. The Respondent is ordered to pay the costs of the contempt of court application on an attorney and client scale.
5. If requested by either party, reasons for the order will be provided on finalisation of the Rule 43(6) application.

B. RULE 43 (6) APPLICATION

1. In accordance with Rule 43 (5):

- 1.1. The respondent, Mrs T[...], shall within 10 days of this order file an affidavit:
 - 1.1.1. Providing the details of her current employment at H[...] House School, Sunland, in particular the details of her salary package;
 - 1.1.2. The details of her medical conditions, lupus and depression, together with supporting affidavits, if necessary;
- 1.2. The applicant, Mr T[...], shall within 10 days of this order file an affidavit:
 - 1.2.1. Attaching his bank and credit card statements for the period 01 March 2024 to 15 August 2024;
 - 1.2.2. Detailing any other income or benefits he receives in addition to what is reflected in the statements.
2. Within 5 days of compliance with paragraph 1 above the parties may file a further affidavit dealing only in the issues referred to above.
3. Pending compliance with paragraphs 1 and 2 above the application is postponed sine die. The parties are to approach the presiding judge to arrange a suitable date for the further hearing of the rule 43 (6) application.
4. Costs of the application are reserved.”

[10] As is evident from the Interim Order the Respondent was found to be in contempt of court and on pain of imprisonment was ordered to purge his contempt.

[11] Insofar as the Variation Application was concerned, the changed circumstances alleged by the Respondent was that subsequent to the Rule 43 Order the Applicant had found a job and was gainfully employed. This was not in dispute, but despite it being of obviously crucial importance to the matter she did not disclose her salary, nor was Ms Crouse able to advise me from the bar what she was earning.

[12] I accordingly ordered the Applicant to disclose on affidavit the details of her current employment.

[13] In addition, due to the manner in which the Respondent had patently lied about his income in the Rule 43 and the Contempt Application he was ordered to disclose on affidavit all income and benefits in addition to those already disclosed.

[14] Based on the further information the parties were permitted to file further affidavits dealing only with the issues referred to in Part B of the Interim Order and the matter was postponed to be resumed before me in due course.

[15] Both parties complied with the Order. When the matter resumed on 10 September 2024 both parties had filed lengthy affidavits² essentially re-arguing the Rule 43. Both parties, but in particular the Applicant, ignored paragraph B2 of the Interim Order (see above) which was to the effect that further affidavits were permitted dealing only with the issues mentioned in Part B of the Interim Order. Be that as it may, in the interests of finality, I allowed the matter to proceed.

[16] Of relevance from the Applicant's point of view is that she is employed by H[...] House School as a "*permanent employee*" earning R11,550.00 gross per month, plus an additional R8,325.00 for attending to aftercare (which amount is variable). Her net income for July 2024 (being the only salary slip disclosed by her) was R17,408.91.

[17] Unfortunately, any further information as to her medical condition is sadly lacking. She alleges that she suffers from lupus (a neurological disease) and depression. Apart from her own self-diagnosis there is no independent medical evidence to support her

² A further 173 pages.

contention that (a) she suffers from the illnesses she contends, and (b) that as a result thereof she is unable to work, or at the very least should not be working. Given that she claims to be on prescribed medication for anxiety and depression, the complete lack of detail is concerning, if not suspicious.

[18] From the Respondent's point of view his further affidavits clearly show that he is in a position to afford to pay the maintenance ordered in the Rule 43 Order. However, he alleges that due to the fact that the Applicant is now earning in excess of what he was ordered to pay her (R15,000.00) he is entitled to a variation deleting the said amount.

[19] The Applicant counters this by stating that the only reason she sought employment was because of the Respondent's failure to comply with the Rule 43 Order which, *inter alia*, forced her to dip into an inheritance. She says that even with her current income and the R15,000.00 per month she doesn't come out.

[20] Both arguments have merit. However, it must be borne in mind that the Applicant was previously employed and lost her job, not due to ill-health, but because she was retrenched. When forced due to circumstances (the Respondent's contempt) she was able to find employment and is holding down a job despite her protestation of ill-health.

[21] The bottom line is that her circumstances have changed for the better and this will be reflected in the order I intend to make.

[22] The Variation Application became side-tracked by a dispute over whether the Respondent (actually his mother) is in the process of selling the house in which the Applicant currently resides. Despite the Respondent's denial, it would appear that this is the case and it resulted in the Applicant filing a further affidavit (in addition to the voluminous one in response to the Interim Order) dealing with, *inter alia*, her relocation costs, and the like. She says she has found alternative accommodation, but the costs of the move are very sketchy.

[23] This issue can be dealt without further ado: if and when the house is sold and the Applicant is forced to relocate she will be entitled to bring an application in accordance with

Rule 43(6). Until then her circumstances have not changed. The same applies if her employment should come to an end.

[24] In conclusion, I am satisfied that the Respondent has made out a case for a variation.

[25] Insofar as costs are concerned, the resumed hearing was occasioned in large measure due to the Applicant's failure to disclose her income in the first place. In **MTM v MMGT**³ Liebenberg AJ stated (at para [17]):

"[17] There is a duty on an applicant who seeks equitable redress to act with the utmost good faith, and to disclose fully all material financial information. Any false disclosure or material non-disclosure may justify refusal of the relief sought."
[Underlined for emphasis].

And in **Du Preez v Du Preez**⁴ Murphy J opined (at para [16]):

"[16] Moreover, the power of the court in rule 43 proceedings, in terms of rule 43(5), is to "dismiss the application or make such order as it thinks fit to ensure a just and equitable decision". The discretion is essentially an equitable one and has accordingly to be exercised judicially with regard to all relevant considerations. A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done. Consequently, I would assume, there is a duty on applicants in rule 43 applications seeking equitable redress to act with the utmost good faith (*uberrime fide*) and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with "clean hands" and on that ground alone the court will be justified in refusing relief." [Underlined for emphasis].

³ Gauteng Division, Johannesburg: case no. 2023-012335
⁴ [2008] 22600 (T)

[26] In the present matter, unlike the authorities quoted above, it would not be appropriate to dismiss the application as it is the Respondent who is seeking relief in the form of a reduction. He is not responsible for the material non-disclosure.

[27] In retrospect it is obvious why the Applicant was reluctant to disclose her income. It was detrimental to her case. As a result of this omission the moral high ground which she enjoyed in the Contempt Application has completely dissipated. In the circumstances she should be held liable for the costs of the resumed hearing on 10 September 2024 on the same basis as the Respondent was ordered to pay the costs of the Contempt Application.

[28] The Respondent is entitled to a reduction in the maintenance payable, but not to the extent claimed by him, bearing in mind the fact that the Applicant was forced to utilize a substantial amount of her inheritance due to the Respondent's contempt, and it has been nearly a year since the Rule 43 Order was made.

[29] I make the following order:

1. Paragraph 1 of the Court Order of 5 December 2023 is varied by the replacement of the sum of R15,000.00 with the sum of R7,500.00 payable by the Respondent (Mr T[...]) to the Applicant (Mrs T[...]), as from 1 November 2024.
2. Save for the above the Court Order dated 5 December 2023 remains in all respects unaltered.
3. The Applicant (Ms T[...]) is to pay the costs occasioned by the hearing on 10 September 2024 on an attorney and client scale.

NJ MULLINS
(ACTING JUDGE OF THE HIGH COURT)

REPRESENTATION:

Obo the Applicant:

Instructed by:

Adv. L Crouse SC

ANNALI ERASMUS INC.

11 Bird Street

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GQEBERHA

Obo the Respondent:

Instructed by:

Adv. G Joubert

Steyn Inc. (PE)

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